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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

CITY AND COUNTY OF SAN FRANCISCO, Petitioner, v. THE SUPERIOR COURT OF SAN FRANCISCO COUNTY, Respondent; PACIFIC POLK PROPERTIES, LLC; CALIFORNIA-NEVADA ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH, Real Parties in Interest.	A133691 (San Francisco County Super. Ct. No. CGC-10-501886)

INTRODUCTION

In this mandamus action, we consider whether respondent San Francisco County Superior Court properly overruled the demurrer of petitioner City and County of San Francisco (the City) to the second amended petition for writ of mandate and complaint (second amended complaint) of real parties Pacific Polk Properties LLC (Pacific Polk) and the California-Nevada Annual Conference of the United Methodist Church (Conference or church). The superior court determined real parties had adequately pleaded it would have been "futile" to exhaust their administrative remedies before bringing an administrative mandamus action challenging the City's denial of various permits and approvals related to property owned by the Conference that they have

contracted to sell to Pacific Polk for demolition and construction of condominiums. We shall conclude respondent superior court should have sustained the City's demurrer to real parties' second amended complaint on the basis that real parties failed to exhaust their administrative remedies. In addition, the court should have also sustained the demurrer as to the ninth, tenth and eleventh causes of action brought under title 42 of the United States Code section 1983.[1]

BACKGROUND

Facts

The background of this dispute was described in *California-Nevada Annual Conference* [*of the United Methodist Church*] *v. City and County of San Francisco* (2009) 173 Cal.App.4th 1559, 1562 (*Cal-Neva Annual Conference*):

"The property known as The First St. John's United Methodist Church, located at 1601 Larkin Street in San Francisco (the property), was constructed in 1911. The property is eligible for listing on the National Register of Historical Places and the California Register of Historical Resources. For some 90 years the property was used to conduct religious services. Due to changing demographics and declining membership, the congregation decided that it could no longer afford to maintain the property. In March 2004, the congregation merged with another local United Methodist congregation and transferred ownership of the property to The California-Nevada Annual Conference of the United Methodist Church (the church), a California religious corporation and administrative arm of the United Methodist Church.

"When title was transferred, the building was being used only as a daycare and children's preschool facility. Soon thereafter it was determined that the unreinforced masonry building was unsafe for occupancy and needed significant seismic retrofitting, among other repairs. The building was vacated in 2005 and ever since has remained vacant. The church concluded 'that because the congregation no longer wanted or needed to occupy the property, along with the fact that the structure was dilapidated,

[1] References to "section 1983" are to title 42 of the United States Code section 1983.

potentially hazardous and in need of significant structural attention, the only rational decision was to demolish the building.' According to the church's director of administrative services, 'The property has no use within the church's mission except as an important source of revenue to be generated by a sale. The church intends to use the sale proceeds to further its ministry in the city, where it has 14 congregations.' In 2004 the church contracted to sell the property to Pacific Polk . . . for the development of a 27–unit residential condominium project. Appropriate applications were filed with the city's planning and building inspection departments to obtain permission to raze the property and to proceed with construction." (*Cal-Neva Annual Conference, supra,* 173 Cal.App.4th at p. 1562.)

According to the second amended petition and complaint filed by real parties in interest,[2] on June 15, 2004, the Conference filed an environmental evaluation, conditional use permit (CUP) application and various other applications with the City's planning department to obtain permission to raze the property and to build a multi-family residential project. Later in the year, real parties applied for demolition and new construction permits. On March 22, 2005, real parties were notified by the planning department that an environmental impact report (EIR) would need to be prepared for the project. A draft EIR for the project was published on April 14, 2007. (See *Cal-Neva Annual Conference, supra,* 173 Cal.App.4th at p. 1563.)

In June 2007, after public hearings conducted in May by the City's landmarks preservation advisory board and the board of supervisors' land use and economic development committee, the board of supervisors approved a resolution initiating the process of designating the property as a local landmark. In August 2007, the Conference and Pacific Polk filed a petition for writ of mandate seeking to halt the landmark process. The superior court granted judgment in their favor and issued a writ of mandate commanding the City to halt the process of designating the property as a landmark. (*Cal-*

[2] As this matter arises on a challenge to the denial in part of a demurrer, we take the facts as stated in the second amended complaint. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

Neva Annual Conference, supra, 173 Cal.App.4th at p. 1564.) Division Three of this court affirmed that judgment on the ground that the church property was exempted by statute from local landmark designation restrictions (Gov. Code, §§ 25373, 37361) and the City had "no jurisdiction to apply its landmark ordinance to the church property . . . ." (*Cal-Neva Annual Conference*, at pp. 1563, 1572.)

On May 27, 2010, the City's planning department published the final EIR and noticed consecutive hearings on that document and on the CUP before the planning commission for June 24, 2010. The notice also stated, erroneously, that the project needed a variance from the bulk requirements. Such variance was not required as the project was in full compliance with planning code bulk provisions.

Learning before the hearing that several commissioners were concerned with the proposed design of the replacement building, real parties requested to continue both the final EIR and CUP hearings, so they could modify the design to incorporate commissioners' suggestions and resolve design issues. Continuances of this sort are routinely and regularly granted. In this case, the commission denied the request for a continuance.

At the hearing on the final EIR, the planning department recommended the commission certify the final EIR. Project opponents urged the commission to deny the CUP and to include language "exempting" the project from the California Environmental Quality Act as a project that had been disapproved. (Pub. Resources Code, § 21080, subd. (b)(5).) The commissioners discussed whether they were permitted to hear the CUP if they failed to certify the EIR. In the end, in a four-to-three vote, the commission determined that the final EIR was inadequate and could not be certified due to aesthetics and the document's failure to address alternative uses for the property. No written or oral findings of inadequacy were made or voted upon. Instead of sending the EIR back to planning staff for further work as is usually done to address inadequacies found by the commission, the commission voted to deny certification of the final EIR. It then conducted a hearing on the CUP application.

At the outset of the hearing on the CUP application, counsel for Pacific Polk advised the commission it must vote on two aspects of the project—the application for a demolition permit and the application for a building permit. The planning department recommended the commission deny the CUP because of the project's bulk (which had been incorrectly calculated by planning staff) and the failure to meet residential design guidelines (also arbitrarily and incorrectly evaluated by planning staff). The commission voted to deny the CUP, including the application for the demolition permit and the application to construct the proposed condominium project. They gave no reasons for denying the application for the demolition permit. The commission adopted the "exemption" amendments proposed by project opponents.

Real parties then filed a petition for writ of mandate and a complaint in the San Francisco Superior Court, challenging the actions of the City. The City successfully demurred. After real parties filed their initial writ petition and complaint in the superior court, the City voided and cancelled real parties' applications for both demolition and building permits. Real parties have sought discovery of the letter written by the staff planner for the project, directing the building department to cancel both permits.

On July 22, 2011, the Conference and Pacific Polk filed the operative second amended complaint, seeking a writ of mandate (injunctive relief), declaratory relief, and monetary damages. The second amended complaint alleged eleven causes of action. The first and second causes of action challenged the cancellation of the application for a demolition permit and the City's refusal to issue a demolition permit; the third and fourth causes of action challenged the City's failure to certify the final EIR or to allow it to be supplemented and then certified as final. The fifth cause of action challenged the denial of the CUP and the application for a building permit. The sixth cause of action challenged the decision on the "variance application" and the planning commission's consideration of the CUP in the absence of a certified final EIR, as well as its adoption of a CEQA "exemption." This cause of action seeks an order vacating the denial of the CUP and the building permit and commanding the City either to issue those approvals or to hold a hearing before the planning commission on the most current form of the project

within 60 days of certifying the final EIR. The seventh cause of action alleges inverse condemnation under the California Constitution. The remaining eighth through eleventh causes of action raise federal constitutional claims pursuant to 42. U.S.C. section 1983. The eighth cause of action alleges a regulatory taking of property under the Fifth Amendment. The ninth, tenth and eleventh causes of action allege violations of procedural due process, substantive due process and equal protection. In addition to declaratory relief and damages, real parties sought a writ of mandate directing the City to: vacate the decision not to certify the EIR and to either certify the EIR or to prepare a supplement to the final EIR and certify it at no additional cost to real parties; vacate the denial of the CUP and the cancellation of the demolition and building permit applications, reinstate the CUP, demolition and building permit applications and either grant them (together with the variance) or, in the alternative, calendar hearings on the merits of the demolition permit by itself and on the CUP and variance for the most current form of the project.

The City demurred on the ground, among others, that real parties had failed to exhaust their administrative remedies by failing to appeal the CUP denial to the board of supervisors and the revocation of the demolition permit and building permit applications and variance denials to San Francisco Board of Appeals. [3] The superior court sustained the City's demurrer in part and overruled it in part, sustaining the demurrer to the first, third, and fourth causes of action,[4] and overruling the demurrer as to remaining causes of action.

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[3] Pursuant to San Francisco Planning Code section 308.1, denial of a CUP by the planning commission may be appealed to the board of supervisors. Similarly, a permit applicant can appeal the denial or revocation of a building permit to the San Francisco Board of Appeals. (S.F. Charter, § 4.106, subd. (b); S.F. Bus. & Tax Regs. Code, § 30.) The zoning administrator's denial of a variance may be appealed to the board of appeals. (S.F. Planning Code, § 308.2; S.F. Charter § 4.106, subd. (b); S.F. Bus. & Tax Regs. Code, § 30.)

[4] The court sustained the City's demurrer to the first cause of action challenging the refusal to issue a demolition permit and the third and fourth causes of action challenging the failure to certify the final EIR, on grounds that both involved matter

In overruling the demurrer as to all but three causes of action, the court concluded that real parties had sufficiently pled the futility exception to the exhaustion of administrative remedies requirement where they had alleged "that appealing the decisions to the Board of Supervisors would have been futile 'because the Board of Supervisors is the body that started the landmarking process and *continues to landmark the building through other city agencies,* like the Planning Commission." (Original italics.) It also granted in part and denied in part the City's motion to strike, denying some of the motions to strike on grounds they were moot in view of the rulings on demurrer, granting portions of the motion to strike certain paragraphs of the second (demolition permit) and fifth (CUP/building permit) causes of action, and granting the motion as to parts of the prayer for relief on the ground that the real parties could not seek an order from the court directing the planning commission to exercise its discretion in a particular way. (Code Civ. Proc., § 1094.5.) The court also granted the City's motion to strike the sixth cause of action regarding a variance, as real parties had failed to seek leave to amend to add this claim. The court denied the City's motion to strike as to all other portions of the complaint and writ petition.

The City petitioned this court to issue a writ of mandate overturning that part of the superior court's order overruling the City's demurrer and ordering the superior court to sustain the demurrer on the ground that real parties failed to exhaust their administrative remedies before bringing their administrative mandamus action in the superior court.

On November 15, 2011, we issued an alternative writ of mandate, directing respondent superior court to set aside and vacate its order overruling City's demurrer to

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within the sound discretion of the planning commission. The court further reasoned that the issuance of the demolition permit was discretionary and not a ministerial act, as it was part of a larger project requiring CEQA review. The third and fourth causes of action were barred because the City had no duty to certify the EIR after rejecting the project. Pacific Polk and the Conference have challenged the superior court's sustaining of the demurrer to the first cause of action by a separate petition for writ of mandate or prohibition. That petition is currently pending (No. A133740).

real parties' second amended petition for writ of mandate and complaint or to show cause why it should not be compelled to do so. Following a February 24, 2012 hearing at which the superior court considered whether to reconsider and vacate its prior order in compliance with our alternative writ of mandate, the superior court determined it would not comply and reaffirmed its previous ruling. On April 2, 2012, we notified the parties that the matter had been assigned to a judicial panel. The parties waived oral argument.

DISCUSSION

I. Writ Relief Is Appropriate

"A writ of mandate may be issued 'where there is not a plain, speedy, and adequate remedy, in the ordinary course of law,' such as '[w]here there is no direct appeal from a trial court's adverse ruling, and the aggrieved party would be compelled to go through a trial and appeal from a final judgment . . . .' (Code Civ. Proc., § 1086; *Fair Employment & Housing Com. v. Superior Court* (2004) 115 Cal.App.4th 629, 633.)" (*San Bernardino Associated Governments v. Superior Court* (2006) 135 Cal.App.4th 1106, 1113.) The delay and expense of unnecessary litigation, including its impact on judicial resources, are valid considerations in deciding whether to grant writ review. (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1367, citing *Phelan v. Superior Court* (1950) 35 Cal.2d 363, 370.) By issuing the alternative writ in the first instance, we indicated we considered this an appropriate case for review by writ of mandate.

II. Exhaustion of Administrative Remedies

A. *The futility exception to the rule of exhaustion of administrative remedies*

In our order granting the alternative writ, we explained our reasons for rejecting the trial court's determination that administrative appeals would have been futile. We reiterate that reasoning here.

" 'A party need not pursue administrative remedies when the agency's decision is certain to be adverse.' (*Collins v. Woods* (1984) 158 Cal.App.3d 439, 442.) This 'futility' exception to the exhaustion of administrative remedies requirement has been

considered in many cases. [Citations.][5] 'The futility exception . . . is a very narrow one.' (*County of Contra Costa v. State of California*[, *supra,*] 177 Cal.App.3d 62, 77.) It does not apply ' " 'unless the petitioner can positively state that the [administrative body] has declared what its ruling will be in a particular case.' " ' (*Sea & Sage* [, *supra*] 34 Cal.3d 412, 418 . . . ; see also *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 89.)" (*Economic Empowerment Foundation, supra,* 57 Cal.App.4th 677, 690; accord, *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 936.)

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[5] As Witkin observes: "The futility exception will be rejected where it is possible that the agency will make an exception to its alleged preexisting policy in a particular case on the showing made. (See *Frisco Land & Mining Co. v. California* (1977) 74 [Cal.App.]3d 736, 757; *In re Serna* (1978) 76 [Cal.App.]3d 1010, 1014; *Mountain View Chamber of Commerce v. Mountain View* (1978) 77 [Cal.App.]3d 82, 91.) [¶] . . . The exception may be invoked only when a petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case. (See *Gantner & Mattern Co. v. California Emp. Com.* (1941) 17 C[al].2d 314, 318; *Sea & Sage Audubon Soc. v. Planning Com.* (1983) 34 C[al].3d 412, 418 [(*Sea & Sage*)] [exception was not available where agency merely indicated its view of legislative policy in relation to matter and never addressed or decided legal issue]; *Coachella Valley Mosquito & Vector Control Dist. v. California Public Emp. Relations Bd.* (2005) 35 C[al].4th 1072, 1081 [exception was not available to public employer defending unfair labor practice charge by public employee union, where employer, though able to show how agency would rule on statute of limitations defense, was unable to show how agency would decide outcome of case]; *Doyle v. Chino* (1981) 117 [Cal.App.]3d 673, 683; *Edgren v. Regents of Univ. of Calif.* (1984) 158 [Cal.App.]3d 515, 522 [(*Edgren*)] ; *Contra Costa v. California* (1986) 177 [Cal.App.]3d 62, 77, 78; *Twain Harte Associates, Ltd. v. Tuolumne* (1990) 217 [Cal.App.3d 71, 90 [question is one of fact]; *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677,690 (*Economic Empowerment Foundation*), citing the text [exception was not available where agency had taken no position on merits of issue in case, even if agency had treated plaintiff unfairly in other, unrelated proceedings]; *Imagistics Int. v. Department of General Services* (2007) 150 [Cal.App.]4th 581, 590 [plaintiff's reliance solely on historical statistics purporting to show that administrative procedure was sham was unavailing]; *San Francisco v. International Union of Operating Engineers, Local* 39 (2007) 151 [Cal.App.]4th 938, 947 [city seeking to compel employee union to submit labor dispute to binding arbitration was not excused from pursuing remedies with Public Employment Relations Board merely because board had earlier denied emergency injunction sought by city to require union to participate in collective bargaining impasse procedures].)" (3 Witkin, Cal. Procedure. (5th ed. 2008) Actions, § 341, p. 447.)

Even demonstrated bias in the past is insufficient to establish the futility exception. (*Economic Empowerment Foundation,* at pp. 690-691 [holding claim of insurance commissioner's bias insufficient to establish futility exception; "that the Commissioner may have treated [the plaintiff] and other intervenors unfairly in other proceedings does not establish that he is bound to do so in this one"].)

The trial court overruled the City's demurrer, explaining that real parties "sufficiently pled futility" by alleging "the decisions of the Board of Supervisors would have been futile 'because the Board of Supervisors is the body that started the landmarking process and *continues to landmark the building through other city agencies,* like the Planning Commission.' " We "must presume the truth of [the plaintiff's allegations . . . for purposes of ruling on the demurrer." (*Economic Empowerment Foundation, supra,* 57 Cal.App.4th at p. 690.) Nevertheless, real parties have failed to sufficiently allege futility here. First, only six members of eleven members of the 2007 board of supervisors remained on the 2010 board. Second, the allegation that the board of supervisors "continues to landmark the building through other city agencies" is not properly categorized as a material allegation of fact entitled to the presumption of truth on demurrer, but rather is a contention and conclusion of fact, that is not entitled to the presumption. (*Moore v. Regents of University of California, supra,* 51 Cal.3d 120, 125 ["We do not, however, assume the truth of contentions, deductions, or conclusions of fact or law"].) Without that presumption, real parties have failed to show that either the appeal of the CUP denial to the newly reconstituted board of supervisors or the appeals of the other permit denials and revocations to the board of appeals would have been a fait accompli; real parties have not shown that the newly constituted board "has declared what its ruling will be in [this] case." (*Sea & Sage, supra,* 34 Cal.3d at p. 418.)

Nor are we persuaded by the "Statement of Verified Facts" presented in real parties' return that they believe support their futility claim. These "facts," which were not before the superior court and which were purportedly related to Pacific Polk by an "agent of the City," recount the alleged efforts of Aaron Peskin, president of the board of supervisors in 2007, to support the landmarking of the building by contacting members of

the landmarks preservation board, planning commission and board of supervisors with regard to his desire to have the landmarking resolution adopted and the project killed. The statement further purports to recount the continuation of efforts of Peskin's successor, Supervisor David Chiu, to undermine the project in a multitude of ways, including, but not limited to, communicating with the planning commission, meeting with three commission members, meeting with City's planning director, City staff members, and others and recommending disapproval of the final EIR, CUP and any variance.

Real parties present no authority supporting the admissibility of such "evidence" in this type of proceeding. Such factual allegations "are neither properly noticeable nor reviewable on appeal from, *or on a petition for writ from*, an order [on] a demurrer. A demurrer tests the legal sufficiency of the complaint's allegations; not their truth or the plaintiff's ability to prove them. [Citation.]" (*Stevens v. Superior Court* (1999) 75 Cal.App.4th 594, 608, italics added.)

Furthermore, were we to consider these "facts," the efforts and communications of one member of the board of supervisors (even the president of the board) and his predecessor would be insufficient to meet the futility test of *Sea & Sage*—that the board "has declared what its ruling will be in [this] case." (*Sea & Sage*, *supra*, 34 Cal.3d at p. 418; see Schwing, 1 Cal. Affirmative Defenses (Thompson-West 2012) § 16:4, pp. 1075-1079, fns. omitted.[6]) Real parties make no factual allegations at all regarding

[6] "Evidence that a member of the administrative staff expressed the opinion that the agency could do nothing further for the plaintiff is both inadmissible hearsay and wholly insufficient evidence of exhaustion. Use of such evidence has long been rejected in California, as reflected in an oft-cited 1941 decision *Abelleira v. District Court of Appeal*:

" '[The litigants] assert that the commission has already decided cases on similar facts against their present position, and therefore that an appeal in the instant case would be fruitless . . . . [T]heir position is unsound in principle and unsupported by the better authorities, for it was early perceived that to countenance this view would break down the rule of exhaustion of remedies. In substance the contention is that if they learn upon hearsay or by analogy that the administrative board may take a certain action, the board may be ignored and its action treated as already taken. We should all be very much surprised, no doubt, to find such an assertion made in the judicial field. One might

10 of the 11 members of the board of supervisors or any member of the City's board of appeals.

B. ***Absence of a certified final EIR does not render administrative appeals futile***

Real parties contend it would have been futile to appeal the denial of the CUP to the board of supervisors, as the board could *not* have approved the project, had it wished to do so, without a certified EIR or equivalent environmental supporting document, such as a negative declaration or a finding of categorical exemption. They contend that, because the planning commission had failed to certify the EIR or equivalent environmental document, the board of supervisors and board of appeals were precluded by CEQA and the San Francisco Administrative Code from reversing the planning commission's CUP denial, and other permit denials and application revocations.

As explained in *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, at page 848 (*Las Lomas*): "CEQA requires public agencies to consider the environmental impacts of proposed projects and to mitigate or avoid significant impacts, if feasible. (Pub. Resources Code, § 21002.) A public agency must prepare, or cause to be prepared, and certify the completion of an EIR for any project that it proposes to carry out or approve that may have a significant effect on the environment. (*Id*., §§ 21100, subd. (a), 21151, subd. (a).) *Before approving a project, a public agency must certify that an EIR was completed in compliance with CEQA, that the EIR reflects the agency's independent judgment and analysis, and that the agency's decisionmaking*

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attempt, for example, to bring an original suit in the Supreme Court on the theory that the local superior judge was possessed of a particular opinion opposed to the views of the plaintiff, but he would receive scant consideration. The whole argument rests upon an illogical and impractical basis, since it permits the party applying to the court to assert without any conclusive proof, and without any possibility of successful challenge, the outcome of an appeal which the administrative body has not even been permitted to decide.' [¶] In accordance with *Abelleira*, a litigant's 'preconception of the futility of administrative action' does not permit the litigant to bypass an available administrative remedy." (Schwing, 1 Cal. Affirmative Defenses, *supra*, § 16:4, pp. 1078-1079, fns. omitted.)

body reviewed and considered the information contained in the EIR. (Pub. Resources Code, § 21082.1, subd. (c); CEQA Guidelines, § 15090[7].)" (Italics added, fn. omitted.)

"CEQA applies only to projects that a public agency proposes to carry out or approve, and does not apply to projects that the agency rejects or disapproves. (Pub. Resources Code, § 21080, subds. (a), (b)(5).) Section 21080, subdivision (a) states, 'this division shall apply to discretionary projects proposed to be carried out or approved by public agencies.' Subdivision (b)(5) states that CEQA does not apply to '[p]rojects which a public agency rejects or disapproves.' Moreover, the specific requirement to prepare an EIR expressly applies only to projects that public agencies 'propose to carry out or approve' (*id.*, § 21100, subd. (a)) or 'intend to carry out or approve' (*id.*, § 21151, subd. (a)). A public agency need not prepare an EIR for a project that it rejects." (*Las Lomas, supra,* 177 Cal.App.4th at p. 848, fn. omitted.)

The San Francisco Administrative Code, section 31.17, similarly requires that the "certification of completion and the final EIR shall be transmitted . . . to . . . the board, commission or department that is to carry out or approve the project, and shall be presented to the body which will decide whether to carry out or approve the project. These documents shall also be presented to any appellate body in the event of an appeal from the decision whether to carry out or approve the project." (S.F. Admin. Code, § 31.17, subd. (a).) Only *after* review and consideration of the information contained in

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[7] References to "Guidelines" are to the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) Guideline section 15090 provides:

"(a) Prior to approving a project the lead agency shall certify that:

"(1) The final EIR has been completed in compliance with CEQA;

"(2) The final EIR was presented to the decisionmaking body of the lead agency and that the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project; and

"(3) The final EIR reflects the lead agency's independent judgment and analysis.

"(b) When an EIR is certified by a non-elected decision-making body within a local lead agency, that certification may be appealed to the local lead agency's elected decision-making body, if one exists. For example, certification of an EIR for a tentative subdivision map by a city's planning commission may be appealed to the city council. Each local lead agency shall provide for such appeals."

the EIR and after making findings as required by CEQA, may "the appellate body . . . make its decision whether to carry out or approve the project." (S.F. Admin. Code, § 31.17, subds. (b) & (c).)

As the planning commission had rejected the project, it was not required to certify the EIR.[8] Consequently, real parties contend that appeal was futile because the board of supervisors could not reverse the planning commission and *grant* the conditional use permit or variance, absent the certified EIR or some equivalent environmental document (such as a negative declaration, a categorical exemption).[9] Further, real parties explain that without the certified EIR, the board of supervisors could not make the written findings required to support the issuance of a statement of overriding consideration that would allow it to grant a CUP in the instant case. (Guidelines, §§ 15091, 15092, 15093.)

We agree that the City could not *approve* the project without having before it the certified EIR or equivalent environmental document. Nevertheless, the inability of the board of supervisors or the board of appeals at that point to grant the full relief sought by real parties, that is to *approve the project* by granting the CUP or other permits, did not make administrative appeal futile. It is well recognized that exhaustion of administrative remedies is required even where the administrative remedies cannot provide the plaintiff with all of the relief he or she seeks. (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 323 (*Campbell*).

As explained by the California Supreme Court in *Campbell, supra,* 35 Cal.4th 311, exhaustion of administrative remedies was required where the administrative agency had authority to hear the complaint, even though it lacked the ability to award the full remedy

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[8] In San Francisco, "[t]he City and all its officials, boards, commissions, departments, bureaus and offices shall constitute a single 'local agency,' 'public agency' or 'lead agency' as those terms are used in CEQA." (S.F. Admin. Code, § 31.04.)

[9] In an interesting concession, real parties state that had the planning commission "certified the EIR, and then (and only then) denied the conditional use permit . . . . Pacific Polk and the Church would have been required to appeal to the Board of Supervisors and said appeal would not have been futile because the board could have theoretically reversed the Commission's decision and granted the conditional use permit." ~(Return 37)~

sought by the plaintiff. The court stated: "[E]ven though Campbell's complaint seeks money damages in addition to reinstatement, our cases hold that the 'policy considerations which support the imposition of a general exhaustion requirement remain compelling . . . ' (*Westlake* [*Community Hosp. v. Superior Court* (1976)] 17 Cal.3d [465,] 476 [(*Westlake*)].) The logic holds even when no internal damage remedy is available, or a plaintiff seeks only money damages, so that resort to the courts is inevitable. As *Edgren* explains, courts have found the rule inapplicable only when the agency lacks authority to hear the complaint, not when the administrative procedures arguably limit the remedy the agency may award. (*Edgren, supra,* 158 Cal.App.3d [515,] 521; see also *Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 342-343 [exhaustion rule does not apply when resolution of controversy falls outside scope of grievance procedures].) We believe that the 'administrative proceeding will still promote judicial efficiency by unearthing the relevant evidence and by providing a record which the court may review.' *(Westlake, supra,* 17 Cal.3d at p. 476.)" (*Campbell,* at p. 323.)[10]

The board of supervisors has jurisdiction to hear appeals from the denial of CUPs. (S.F. Planning Code, § 308.1, subd. (a).)[11] It must act within the time limits specified in

[10] We note that not even the superior court in the mandamus action would have been able to provide all the relief sought by real parties. As the court recognized, although it could overturn the actions taken by the City, it could not *compel* the City to exercise its discretion in a particular way on a matter lawfully within the City's discretion. (Code Civ. Proc., § 1094.5, subd. (f) ["The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent"]; *Viso v. State of California* (1979) 92 Cal.App.3d 15, 22, fn.2 [" A writ of mandate cannot be used to control the lawful exercise of discretion and thus cannot be used to compel the grant of a variance or conditional use permit"].)

[11] "**Right of Appeal.** The action of the Planning Commission, . . . in approving or disapproving in whole or in part an application for conditional use authorization . . . shall be subject to appeal to the Board of Supervisors in accordance with this Section. An

the planning code or be deemed to approve the action of the planning commission. (*Id.*, subd. (c).) The board of supervisors has broad authority to exercise its discretion in rendering its decision. Section 308.1, subdivision (d) of the San Francisco Planning Code provides in relevant part: "In the event the Board disapproves the action of the Commission when the Commission has disapproved in whole or in part a proposed conditional use, the Board shall prescribe in its resolution such conditions as are in its opinion necessary to secure the objectives of this Code, in accordance with Section 303(d)." Consequently, the board of supervisors could disapprove the action of the planning commission without approving the project. Although real parties assert the board of supervisors has authority to remand to the planning commission *only* where the planning commission has certified an EIR and a third party challenges the certification, they cite section 31.16 of the San Francisco Administrative Code, which covers the appeal of final environmental impact reports where the planning commission has certified a final EIR. That remand is authorized in such circumstance does not suggest that remand is not within the authority of the board of supervisors on appeal of a planning commission determination disapproving a proposed conditional use. Indeed, the planning code provision we quote above, supports our view that the board does have the authority to remand the matter to the planning commission, should the board find substantial merit to any of real parties' substantive or procedural challenges to the actions of the planning commission, such as the claims that real parties were denied a fair hearing, that the planning commission's determination that the project did not comply with planning code bulk requirements was based upon erroneous calculations, or that proper procedures were not followed. Of course, the planning commission would be required to reconsider the final EIR or any new final EIR, before conducting such rehearing. This remedy, although

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action of the Commission so appealed from shall not become effective unless and until approved by the Board of Supervisors in accordance with this Section." (S.F. Planning Code, § 308.1, subd. (a).)

not all that real parties would wish, is adequate to require them to exhaust their administrative remedies before seeking relief in the superior court. [12]

The planning commission's disapproval of the final EIR did not render futile administrative appeals to the board of supervisors or the board of appeals.

C. *Constitutional claims brought under 42 United States Code section 1983 and the exhaustion requirement*

Real parties contend that even if exhaustion of their administrative claims would have been "futile," they are not required to exhaust administrative remedies with respect to their federal constitutional claims (eighth through eleventh causes of action).

"The Supreme Court has made it clear that a section 1983 plaintiff need not have exhausted alternative remedies before initiating a section 1983 action." (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 3365 (*Brosterhous*).) This principle was established in *Patsy v. Board of Regents of Florida* (1982) 457 U.S. 496 [plaintiffs need not exhaust state administrative remedies before instituting § 1983 suits in federal court] and extended to section 1983 actions brought in state court in *Felder v. Casey* (1988) 487 U.S. 131, 134, 148-149 [state notice-of-claim statute preempted with respect to federal civil rights actions brought in state court; "§ 1983 plaintiffs normally need not exhaust administrative remedies"].) As the California Supreme Court recognized in *Brosterhous*, "other decisions of the high court establish that a section 1983 action may be displaced by an alternative remedy only when Congress has foreclosed the right to the

[12] The City also suggests that the board of supervisors could have heard real parties' administrative appeal and, if they determined to grant the CUP for the project, they could have held the appeal until the planning commission completed environmental review by certifying the EIR. The City proffers the example of a recent appeal in which the board of supervisors addressed the matter in this way. The City denied a tentative map application before environmental review was completed. Upon appeal by the project sponsor, the board of supervisors heard the appeal on its merits, despite the incomplete environmental review. The board was apparently prepared to hold the appeal until environmental review had been completed. The board of supervisors ultimately upheld the denial of the tentative map and the project sponsor sought judicial review of that decision. We express no opinion here on the validity of this procedure.

section 1983 action. No state-created remedy may displace a section 1983 action, which is supplementary to any other remedies, unless Congress has expressed an intent that the state remedy do so." (*Brosterhous,* at pp. 326-327, fn. omitted.)

1. *Takings and inverse condemnation causes of action*

"[W]hen it is alleged that property has been taken without due process or adequate compensation in violation of the takings clause of the Fifth Amendment or the Fourteenth Amendment, an adequate state remedy forecloses a section 1983 action because the availability of that remedy precludes a violation of either constitutional right. [Citations.]" (*Brousterhous, supra,* 12 Cal.4th at p. 326, fn. 6.) By the same token, a landowner may not maintain an action in inverse condemnation on the basis of a constitutional just compensation theory without first exhausting state administrative and judicial remedies. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 10-17, 25-26 (*Hensler*).)

The requirement that parties exhaust their administrative remedies before proceeding on an action for unconstitutional taking or inverse condemnation is rooted in the Fifth Amendment. "The Fifth Amendment to the United States Constitution conditions the state's right to take private property for public use on the payment of 'just compensation.' It leaves to the state, however, the procedures by which compensation may be sought. 'If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner has no claim against the Government for a taking.' (*Williamson Planning Comm'n v. Hamilton Bank* [(1985)] 473 U.S. 172, 194-195; see also *Preseault v. ICC* (1990) 494 U.S. 1, 11.) [¶] California provides such a process by making available an action for inverse condemnation if, *after exhausting administrative remedies to free the property from the limits placed on development* and obtaining a judicial determination that just compensation is due, any restrictions for which compensation must otherwise be paid are not lifted." (*Hensler, supra,* 8 Cal.4th at p. 13, italics added.)

In *Hensler, supra,* 8 Cal.4th 1, the California Supreme Court held that a property owner bringing an action for inverse condemnation resulting from the adoption and

application of an ordinance restricting property development was required to exhaust state administrative and judicial remedies. The Supreme Court observed that the plaintiff should have "exhausted his administrative remedies by first seeking a variance *and pursuing an administrative appeal challenging the permit conditions*, and made his claim that the administrative actions constituted a taking in a petition for writ of mandate seeking review of the agency action filed pursuant to Code of Civil Procedure section 1094.5 . . . ." (*Hensler*, at p. 25, italics added.) Having failed to do so, the landowner "may not avoid the application of [the statute of limitations for challenging the action of an administrative body concerning a subdivision] by electing to forego raising his claim in the administrative mandamus proceeding *in which the owner must exhaust administrative remedies for an erroneous, excessive, or unreasonable restriction on development.*" (*Id.* at p. 26, italics added; accord, *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 410-414 (*Mola*) [plaintiff's voluntary dismissal of his mandamus action precluded suit for damages for a regulatory taking, even where brought as claim under section 1983 for civil rights violations].) Real parties attempt to differentiate *Hensler* and *Mola* on the basis that in each case the remedy that the parties failed to exhaust was the requirement that on appeal to the superior court from an administrative determination, a party must bring their administrative mandamus action (Code Civ. Proc., § 1094.5) simultaneously with their federal takings claim. (*Mola*, at p. 410; *Hensler*, at pp. 25-26.) This attempted differentiation founders on the clear holdings of both cases (highlighted by the language that we quote and italicize above) that the landowners could not maintain takings or inverse condemnation actions without first exhausting both state *administrative* and judicial remedies.

In the case before us, real parties' seventh cause of action alleges inverse condemnation under the California Constitution. The eighth cause of action alleges a regulatory taking of property under the Fifth Amendment. Both causes of action are subject to the requirement that real parties exhaust their administrative remedies. Consequently, the trial court erred in refusing to sustain the demurrer without leave to amend as to these two causes of action.

2. *Remaining section 1983 causes of action fail on the merits*

The ninth, tenth and eleventh causes of action raise claims under section 1983, for asserted violations of procedural due process, substantive due process and equal protection. The City does not contend that real parties must exhaust their administrative remedies before bringing these section 1983 claims. Rather, the City asserts the claims are barred under the doctrines of collateral estoppel and res judicata, because the administrative actions became final when real parties failed to pursue their administrative appeals. The City contends that its "administrative actions on the [CUP], variance, and demolition and building permit applications have thus achieved finality" and that real parties are collaterally estopped from relitigating those issues under section 1983. ~(Traverse 28)~ Real parties counter that the cases relied upon by real parties, *Brigg v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, *Knickerbocker v. City of Stockton* (1988) 199 Cal.App.3d 235, and *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, do not provide authority for that proposition. Rather, in each, the plaintiffs had failed to *judicially* challenge a claimed erroneous administrative determination by means of a superior court administrative mandamus action. They were held to be barred under principles of res judicata from seeking relief in a later action for injunctive relief or damages. (See *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65 (*Johnson*)["in [*Westlake*] this court held that unless a party to a quasi-judicial administrative proceeding challenges the agency's adverse findings made in that proceeding, by means of a mandate action in superior court, those findings are binding in later civil actions"].) Of the three cited cases, only *Briggs* involved alleged civil rights claims under section 1983.[13]

[13] In *Johnson supra*, 24 Cal.4th 61, the California Supreme Court explained the difference between exhaustion of administrative remedies and exhaustion of judicial remedies: "This requirement of exhaustion of judicial remedies is to be distinguished from the requirement of exhaustion of administrative remedies. (*Knickerbocker*[, *supra*,] 199 Cal.App.3d 235, 241.) Exhaustion of *administrative* remedies is 'a jurisdictional prerequisite to resort to the courts. [Citation.] Exhaustion of *judicial* remedies, on the other hand, is necessary to avoid giving binding 'effect to the administrative agency's

In the instant action, real parties have *not* failed to pursue the exclusive judicial remedy for reviewing the administrative action of the City. They have filed and are maintaining an action for writ of administrative mandamus in the superior court. Consequently, those cases applying res judicata or collateral estoppel to bar attacks on quasi-judicial administrative determinations have no application here where the administrative determination has not become final and binding due to any failure of real parties to timely pursue administrative mandamus in the superior court.

We need not determine whether the general rule that a plaintiff is not required to exhaust state administrative or judicial remedies before bringing a civil rights challenge under section 1983 applies here, or even whether the failure to exhaust administrative remedies for the first eight causes of action render the section 1983 claims based on the identical allegations moot. Rather, we agree with City that whether or not real parties' section 1983 due process and equal protection claims survive their failure to exhaust their administrative remedies, the court erred in failing to sustain the demurrer to those claims on their merits.

Consonant with *Las Lomas, supra,* 177 Cal.App.4th 837, we conclude that real parties' claims relating to the denial of the various development approvals sought by real parties—CUP, variance, demolition permit, and building permit—do not support the section 1983 due process and equal protection claims raised.

In *Las Lomas,* a developer applied to the City of Los Angeles for various land use approvals required for a large project, but that city voted to reject the project before completing a previously commissioned EIR. (*Las Lomas, supra,* 177 Cal.App.4th at pp. 843–844.) The developer sued alleging, among other things, a violation of section 1983, claiming it had been denied its rights to substantive and procedural due process and to equal protection. (*Id.* at p. 845.) The trial court sustained Los Angeles's demurrer

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decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action.' (*Briggs*[, *supra,*] 40 Cal.App.4th 637, 646, original italics.)" (*Johnson,* at p. 70.)

without leave to amend. (*Id.* at pp. 846–847.) The Court of Appeal affirmed. (*Id.* at p. 842.)

(a) ***Procedural due process.*** *Las Lomas, supra,* 177 Cal.App.4th 873, explained: "The Fourteenth Amendment due process clause states that no state may 'deprive any person of life, liberty, or property without due process of law.' The procedural component of the due process clause ensures a fair adjudicatory process before a person is deprived of life, liberty, or property. [Citations.] Not every denial of a fair hearing for which a remedy may be available under state law implicates constitutional due process. [Citation.] 'The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property.' [Citation.] The range of interests protected by procedural due process is limited. [Citation.]

" A person seeking a benefit provided by the government has a property interest in the benefit for purposes of procedural due process only if the person has 'a legitimate claim of entitlement to it.' [Citation.] A benefit is not a protected property interest under the due process clause if the decision maker has the discretion to grant or deny the benefit. [Citation.] Whether such discretion exists is determined by reference to state and local law. [Citation.] [¶] . . . An ownership interest alone does not cloak the prospect of developing the property with the protections of procedural due process. [Citation.] Rather, a land use application invokes procedural due process only if the owner has a legitimate claim of entitlement to the approval, as we have stated. [Citation.]" (*Las Lomas, supra,* 177 Cal.App.4th at pp. 852-853.)

Las Lomas recognized that the City of Los Angeles had considerable discretion in deciding whether to issue the land use approvals. That discretion prevented the developer from asserting any "claim of entitlement" to the approvals. (*Las Lomas, supra,* 177 Cal.App.4th at p. 854.) Consequently, "[t]he city's denial of those benefits and decision not to proceed with the project . . . was not a deprivation of property for purposes of procedural due process under the Fourteenth Amendment." (*Ibid.,* fn. omitted; see also *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1180

[property owner seeking development permits to demolish a duplex and replace it with a two-unit condominium lacked a property interest sufficient to support a procedural due process claim because the municipal code vested the city with discretion in determining whether to issue the permits].)

Similarly here, there was no denial of procedural due process in the City's process or in its denial of the CUP, variance, demolition or building permits.

(b) ***Substantive due process.*** Nor did real parties adequately allege a substantive due process violation. "Substantive due process protects against arbitrary government action. [Citation.] A substantive due process violation requires more than 'ordinary government error,' and the ' " 'arbitrary and capricious' "' standard applicable in other contexts is a lower threshold than that required to establish a substantive due process violation. [Citation.] A substantive due process violation requires some form of outrageous or egregious conduct constituting 'a true abuse of power.' [Citation.]" (*Las Lomas, supra,* 177 Cal.App.4th at pp. 855-856.)

"Typical land use disputes involving alleged procedural irregularities, violations of state law, and unfairness ordinarily do not implicate substantive due process. (*Stubblefield Construction Co. v. City of San Bernardino* (1995) 32 Cal.App.4th 687, 709-710 & fn. 15 (*Stubblefield*).) *Stubblefield* stated, ' "rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. [Citations.] Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation. [Citation.] The doctrine of substantive due process 'does not protect individuals from all [governmental] actions that infringe liberty or injure property in violation of some law. Rather, substantive due process prevents "governmental power from being used for purposes of oppression," or "abuse of governmental power that shocks the conscience," or "action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." ' [Citations.]" ' (*Stubblefield, supra,* at pp. 709–710 [citation].)

"*Stubblefield* held that evidence that an individual city council member vigorously opposed a development project and proposed an ordinance to block the project, and that city officials initially supported the development but the city council later prevented the development, was insufficient, as a matter of law, to establish a substantive due process violation. (*Stubblefield, supra,* 32 Cal.App.4th at pp. 710-711.) Similarly, *Breneric* [*Associates v. City of Del Mar* (1998)] 69 Cal.App.4th [166,] 184-186, affirmed the sustaining of a demurrer and held that allegations that city council members were hostile to a developer because of his prior business activities in the city were insufficient to support a substantive due process violation." (*Los Lomas, supra,* 177 Cal.App.4th at pp. 856-857.)

Similarly, we can only conclude the allegations contained in the second amended complaint here, if true, do not amount to an outrageous or egregious abuse of power of constitutional dimension and do not adequately allege a substantive due process violation.

(c) ***Equal protection.*** *Los Lomas, supra,* 177 Cal.App.4th 837, also rejected an equal protection claim brought under section 1983 on grounds that apply here as well.

"The federal equal protection clause (U.S. Const., 14th Amend.) and its California counterpart (Cal. Const., art. I, § 7, subd. (a)) provide that persons who are similarly situated with respect to the legitimate purpose of a law must be treated alike under the law. [Citations.] Equal protection challenges typically involve claims of discrimination against an identifiable class or group of persons. The United States Supreme Court in *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, 564, [120 S.Ct. 1073, 145 L.Ed.2d 1060] (*Olech*), however, held that a plaintiff who does not allege membership in a class or group may state a claim as a ' "class of one." ' (*Id*. at p. 564, [120 S.Ct. 1073].) [¶] . . . .[¶] The United States Supreme Court concluded that the complaint alleged a valid claim under the equal protection clause. (*Olech, supra,* 528 U.S. at p. 565, [120 S.Ct. 1073].)" (*Las Lomas, supra,* 177 Cal.App.4th at pp. 857-858.)

"Thus, a 'class of one' equal protection claim is sufficient if the plaintiff alleges that (1) the plaintiff was treated differently from other similarly situated persons, (2) the difference in treatment was intentional, and (3) there was no rational basis for the

difference in treatment. (*Olech, supra*, 528 U.S. at p. 564 [120 S.Ct. 1073]; [citation].) The third element is essentially the same rational basis test typically applied in some other types of equal protection cases.

"The rational basis test is extremely deferential and does not allow inquiry into the wisdom of government action. [Citations.] A court must reject an equal protection challenge to government action 'if there is any reasonably conceivable state of facts that could provide a rational basis for the [difference in treatment]. [Citations.]' [Citations.] 'Where there are "plausible reasons" for [the] action, "our inquiry is at an end." [Citation.]' [Citation.] Under the rational basis test, courts must presume the constitutionality of government action if it is plausible that there were legitimate reasons for the action. In other words, the plaintiff must show that the difference in treatment was 'so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government's] actions were irrational.' [Citation.] Proving the absence of a rational basis can be an exceedingly difficult task. In some circumstances involving complex discretionary decisions, the burden may be insurmountable." (*Los Lomas, supra,* 177 Cal.App.4th at pp. 858-859.)

Las Lomas recognized that " '[t]here are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.' [Citation.]" (*Las Lomas, supra,* 177 Cal.App.4th at pp. 859-860.)

Approval of the proposed development project here and the types of approvals that real parties sought from City in connection with development are quintessentially discretionary determinations. As has been recognized in many cases, " '*Every* appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily

involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983. As has been often stated, "[t]he violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution." ' [Citations.]" (*Clark v. City of Hermosa Beach, supra,* 48 Cal.App.4th at pp. 1179-1180.)

Consequently, we conclude the trial court erred in failing to sustain the City's demurrer without leave to amend to the section 1983 causes of action alleging violations of substantive and procedural due process and equal protection.

D. *Request for leave to amend*

Real parties' request that in the event we determine, as we have, that the second amended complaint fails to sufficiently allege that administrative appeal would have been futile, leave to amend be granted to allow them to allege the "newly discovered facts" they describe in the "Statement of Verified Facts" they include in their return to the writ petition. As we have stated above, the efforts and communications of one member of the board of supervisors (even the president of the board) and his predecessor would be insufficient to meet the futility test of *Sea & Sage*—that the board "has declared what its ruling will be in [this] case." (*Sea & Sage, supra,* 34 Cal.3d at p. 418; see Schwing, 1 Cal. Affirmative Defenses, *supra,* § 16:4, pp. 1075-1079, fns. omitted.) Real parties make no factual allegations at all regarding the majority of members of the board of supervisors or any member of the City's board of appeals. (*Ante*, at pp. 10-11.) The asserted attempts to influence the board of supervisors, the board of appeals, the planning commission or City staff make no difference in this case to the determination that real parties have failed to adequately plead that exhaustion of administrative remedies would have been "futile."

CONCLUSION

Real parties failed to exhaust their administrative remedies and the City's demurrer to the first through eighth causes of action of real parties' second amended

complaint should have been sustained on that basis. The court further erred in failing to sustain the demurrer as to the ninth through eleventh causes of action alleging violations of due process and equal protection under section 1983.

DISPOSITION

We reverse the decision of the superior court refusing to sustain the demurrer to the second amended complaint in its entirety. We direct the court to sustain the demurrer to the second amended complaint in its entirety, without leave to amend.

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Kline, P.J.

We concur:

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Lambden, J.

_____
Richman, J.